No. 14536

IN THE

United States
Court of Appeals
For the Ninth Circuit

BERNARD BLOCH,
Appellant,

vs

UNITED STATES OF AMERICA,....
Appellee.

BRIEF OF APPELLANT UPON APPEAL FROM DISTRICT COURT OF THE UNITED STATES, FOR THE DISTRICT OF ARIZONA.

FRANK E. FLYNN
Attorney for Appellant
202 Arizona Title Bldg.
Phoenix, Arizona.

McGREW PRINTERY, PHOENIX, ARIZONA

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CITATIONS AND AUTHORITIES

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STATEMENT OF THE CASE

The Indictment in this case contained eight counts. Counts III and VI were dismissed and a verdict of guilty was returned on each of the other Counts:

Count I, of the indictment reads as follows:
"Count I. (26 U.S.C. 2554 (a)—That on or about the 24th day of Setember, 1953, within the County of Maricopa, State and District of Arizona, Bernard Bloch did then and there, knowingly, wilfully,

Where not otherwise designated numbers refer to the page in the Abstract of record.

fraudulently and feloniously sell to one R. S. Cantu, a certain quantity of narcotic drug, to-wit, approximately 10 c.c. of morphine sulfate, which said sale was not in pursuance of a written order of the said R. S. Cantu to the said Bernard Bloch on a form issued in blank for that purpose by the Secretary of the Treasury of the United States, as required by Act of Congress of December 17, 1914, and which said sale was not in the course of professional practice as a physician and R. S. Cantu not being a patient of the said Bernard Bloch, and which said sale was not pursuant to a prescription."

Counts II, IV, V, VII and VIII charge violations of the same section by alleged sales to the same R. S. Cantu all in 1953. For ready reference we list the following information with reference to each of the counts: Count No., Date of Alleged Sale; the description of the Narcotic and the Exhibit No.

Count No. I
Date of Sale: September 24,
Description of Narcotic: 10 c.c. morphine sulfate
Exhibit No. 4A

Count No. II
Date of Sale: October 29
Description of Narcotic: 10 c.c. morphine solution

Exhibit No. 5A

Count No. IV
Date of Sale: October 30
Description of Narcotic: 10 c.c. morphine and 1/20 gr. dilauded
Exhibit No. 6A, 6B

Count No. V
Date of Sale: November 10
Description of Narcotic: 30 c.c. morphine hydrochloride
Exhibit No. 7A

Count No. VII
Date of Sale: November 16
Description of Narcotic: 10 c.c. morphine solution
Exhibit No. 8A

Count No. VIII
Date of Sale: November 19
Description of Narcotic: 20 c.c. morphine
Exhibit No. 9A (3-6)

JURISDICTION

The jurisdiction of this Court is invoked under the provision, Section 1291 of Title 28 U.S.C. The Trial Court had jurisdiction by virtue of Title 26, U.S.C. 2554 (a).

STATEMENT

The defendant was at all times involved in this case a duly licensed Osteopath and at the time of the trial he had practiced eight years at Sunnyslope, Arizona. (176) His record shows that after his graduation from the Osteopathic Medical School in Chicago (177) he had considerable hospital training and experience. (177-178-179) At the time of the charge in the Indictment he was duly registered as required by law and the holder of a Government Narcotic License. (289) (215)

On April 21, 1954, prior to the trial, appellant filed a motion supported by affidavits for the return of seized property and suppression of evidence. (12-13-14) This motion was directed to the search of November 19.

The ruling on this motion was reserved until the time of the trial. (15) A trial was had before the jury and on May 27, 1954, a verdict was returned finding the defendant guilty as charged in Count I, II, IV, V, VII and VIII. (23)

A timely motion for acquittal and for a new trial was filed June 2, 1954. (24-25) This motion was denied on July 6, 1954 and the appellant was sentenced to prison for a term of two years. (25)

A notice of the Appeal together with the required bond was timely filed on July 6, 1954 (28)

It will be necessary in our argument on each of the specifications of error to refer to and quote the evidence to some extent. We will therefor for the sake of brevity postpone a detailed statement at this time.

SPECIFICATION OF ERRORS

Specification of Error No. I

The Court erred in denying appellant's motion for a return of seized property and a suppression of evidence. (12-13-14) (19)

Specification of Error No. II

The Court erred in denying the motion for acquittal made at the conclusion of plaintiff's case. (20)

Specifictaion of Error No. III

The Court erred in denying appellant's motion for acquittal and for a new trial made June 2, 1954. (23-25)

Specification of Error No. IV

Prejudicial error was committed by the misconduct on the part of the Assistant U. S. Attorney in asking the defendant if he had ever been convicted of a felony. (222)

Specification of Error No. V

The Court erred in admitting testimony based upon the search of Appellant's premises on November 19. (116-125-152-156-162-163 and 168)

Specification of Error No. VI

The Court erred in submitting the question of entrapment to the jury. (291)

ARGUMENT

Specifications I and V may be argued together as they are based generally upon the same grounds, namely: illegal search made by the Officers of appellant's premises on the 19th day of November. It was established that a warrant of arrest had been issued three days before but it is clearly established by the evidence and it is uncontradicted that the officers did not have a warrant of arrest with them and that no search warrant had ever been issued. Witness Cantu testified that he had no search warrant. (147-148) Witness Gail Welsh also testified that they had no warrant for appellant's arrest and that they had no search warrant. (154) Witness Ross testified that there had been a warrant for appellant's arrest three days before by the U. S. Commissioner. (161)

The fact that a warrant had been issued three days before the search emphasizes the fact that the Government had ample time in which to have a search warrant issued. They had been watching the appellant for three years. (164-165)

One of the Federal Officers, Mr. Cantu, had been in contact with the appellant and had been in his office on five occasions between September 24 and November 19.

Go-Bart Importing Co. v. U.S.
282 U.S. 344
U.S. v. Lefqowitz
285 U.S. 452
Gould v. U.S.
255 U.S. 298

U.S. v. Robinowitz
70 S.CT. 430, 339 U.S. 56
Judd v. U.S.
190 Fed (2nd) 649
Nelson v. U.S.
208 Fed. 2nd, 505

While in the Robinowitz case supra the court modified the ruling formerly announced regarding the necessity of a search warrant where there was sufficient time to secure one. The ruling that the search must be reasonable still obtains however. In determining the reasonableness of a search many factors must be taken into consideration. We think the time element as it existed in the present case is one of those factors.

Another element to be taken into consideration in this case is that the search was a general exploratory search. (155-156) We quote from Officer Welsh's testimony:

"Q. Did you go into any of the other rooms?

A. Yes.

Q. Assisting in the search?

A. Yes.

Q. Where did you go after you searched Doctor Bloch?

A. Well, I went with Dr. Bloch wherever he went." (155)

Again quoting from Officer Welsh's testimony:

"Q. How many rooms would you say you went through in this search?

A. Three or four there in the front part of the building." (156)

Mr. Justice Minton in his opinion referred to the Go-Bart case and the Lefqowitz case and said:

"Those cases condemn general exploratory search which cannot be undertaken by officers with or without a warrant."

In the Lefqowitz case the court quoted from the Gould case. We think the following is particularly appropriate in the present case:

"Respondents papers were wanted by the officers solely for use as evidence of crime of which respondents were accused or suspected. They could not be lawfully searched for and taken even under a search warrant issued upon ample evidence and precisely describing such things and describing exactly where they were."

We also quote the following from the Lefqowitz case: "Security against unlawful searches is more likely to be obtained by resort to search warrants than by the reliance upon the caution and sagacity of petty officers while acting under the excitement that attends the capture of persons accused of crime."

A more convincing example of the truth of the foregoing statement could not be found than the search in the present case. Here a search was made of a Doctor's office and private papers and records of the Doctor's patients were seized. There is no more confidential relation than that between a Doctor and patient and if the officers had prior to the search made application to any Magistrate for a search warrant indicating that they desired to seize such papers I am sure it would have been denied. None of the articles seized with the exception of the money was used or could have been used in connection with the crime that the defendant was charged with and as said in the Lefqowitz case case the sole purpose of the officers in seizing the papers and records was not to find articles used in the commission of the crime charged but was for the purpose of finding evidence of other crimes. The search could not have been for the purpose of finding narcotics

for the officers well knew that the defendant being a physician could legally possess narcotics.

While it is true that none of the articles seized in this search with the exception of the money was used in evidence, error was committed in permitting the witnesses to testify as to the result of the search. If it is wrong to permit testimony as to what they saw or found in making the search, it is equally wrong to permit a witness to testify as to what he did not see or did not find. In the present case the witnesses were permitted to testify that they did not find a patient card for the witness Cantu (163) who was known to the appellant as Raymond Portillo. We quote part of the testimony of one of the witnesses, Philip P. Ross.

"Q. And in your examination, did you find a patient card, or a dispensing record for Renaldo S. Cantu.

A. No, I did not.

Q. And did you search for it particularly?

A. I searched for Raymond Portillo in particular, but I found none.

Q. There was no record for a Raymond Portillo either?

A. No." (163)

This evidence had only one purpose and that was to create in the minds of the jury the impression that the treatment of Cantu by the appellant was secret and criminal. This testimony was very prejudicial and much emphasis was placed upon it by the Government.

It cannot be claimed that the appellant consented to this search. The appellant was confronted by five officers and the testimony of Witness Ross states that he was very nervous. (162) (217)

In considering a similar situation in the Judd case supra, the court said:

"Intimidation and duress are almost necessarily implicit in such situations."

Specification of Error No. VI

"The Court erred in submitting the question of entrapment to the jury."

This specification is based upon the proposition and theory that in view of the fact that the evidence clearly establishes all of the elements of entrapment, the court should have as a matter of law found that the appellant was illegally entrapped.

The Court instructed the jury in part as follows:

"Where a person has no previous intent or purpose to violate the law, but is induced or persuaded by law enforcement officers to commit a crime, he is entitled to the defense of unlawful entrapment, because the law as a matter of policy forbids a conviction in such a case." (291)

Now let us examine Agent Ross' testimony to the effect that the appellant had been under investigation for a period of two to three years (164) and no complaint except the one in the instant case had ever been made. (166) Cantu testified to the same effect:

"Q. So Doctor Bloch had been under investigation for two solid years by your office.

A. Evidently, yes, sir.

Q. And during those two years, nothing had been found out of the way with reference to his dispensing of narcotics?

A. Correct." (122-123)

When you consider the appellants long years of practice, 8 years of them at the same place in Arizona, it would seem that this case has all of the elements of

illegal entrapment. Appellant had been treating one Hernandez and family for sometime (182) with the knowledge and the consent of the Narcotic Enforcement Officers. (181-183) Appellant was treating Hernandez with a medication consisting of a narcotic in a small amount and atropine, which is an antidote. (184) It is undisputed that the officers asked Hernandez to introduce Cantu to the Appellant for the purpose of making a case against the appellant.

We quote from the appellant's testimony regarding this introduction:

> "But he told me it was his brother, and that he had just come in from Los Angeles, and he was very sick, and he had abdominal cramps. And I told him I wouldn't take care of him, and I didn't take care of his brother, Cantu, Raymond, that day. (183)

This was a direct appeal to the sympathy of the appellant by a patient.

The above testimony of appellant was never contradicted by Hernandez. He was subpoenaed by the Government but was never put on the stand, which in view of the circumstances in this case has some significance. He was not called to corroborate Cantu's testimony as to their first meeting with appellant. Haven't we the right to conclude that Hernandez had he been called would not have corroborated Cantu's statement but would have corroborated the appellant. It seems very clear from all of the testimony that had it not been for the relationship between the appellant and Hernandez; had it not been for Hernandez's request, the appellant would not have attempted the treatment of Cantu or furnished him with narcotics. Up to the time of the meeting between the appellant and Cantu there is not a single bit of evidence which would indicate any violation of the narcotic law on the part of the

appellant, or any disposition to do so. What evidence there is in that connection is to the contrary. We must therefore conclude that the actions of the appellant were the result of suggestion and invitation by the government agents.

Let us briefly review the plot of the agents to entrap the appellant. He had been permitted for a long period of time to treat Hernandez and when the Agents after three years of careful surveillance were unable to discover any criminal activities on the part of appellant, they finally resorted to the use of Hernandez.

The quotation we have taken from the Court's instructions on the law of entrapment correctly states the law and it is supported by all of the authorities which counsel has been able to find. We therefore respectfully submit that because of that law and under the facts in this case as a matter of policy, the conviction is forbidden.

Specification No. II and No. III

No. II—"The Court erred in denying the motion for acquittal made at the conclusion of plaintiff's case."

No. III—"The Court erred in denying appellant's motion for acquittal and for a new trial made June 2, 1954."

At the outset the court should determine that Exhibit 3 and Exhibit 4A were improperly submitted in evidence, there not being sufficient testimony to connect them with the appellant.

The evidence in regard to Exhibit 3 was given by Cantu. He was a block away when he saw Hernandez come out of Appellant's office. He received the Exhibit from Hernandez but he did not see Hernandez receive the Exhibit from the Appellant. (96-97)

We submit that Exhibit 4A may be disposed of on the same basis and Exhibit 4A, is the exhibit upon which Count I depends.

Cantu's testimony in connection with this Exhibit is in substance as follows:

The witness gave appellant a $20.00 bill. Hernandez and the appellant left the room and a few minutes later when Hernandez returned he and the witness Cantu were walking down the hallway when Hernandez handed it to Cantu. (99-100)

The Government in its studied effort to keep Hernandez from the witness stand relied upon the rankiest kind of hearsay and incompetent evidence in laying the foundation for the admission of evidence of Exhibit 3 and Exhibit 4A. The cumulative effect of such evidence together with the other errors complained of by appellant could not fail to influence the jury to the prejudice of appellant.

Let us now consider the insufficiency of the evidence as to the remaining counts. The appellant was charged with the sale of narcotics not in pursuance of a written order, not in the course of professional practice as a physician and not in pursuance of a prescription to a patient. We think it will be conceded that if the sale was made in the course of professional practice as a physician that no order blank was necessary and it could be administered directly without a prescription.

We are convinced that the jury did not understand. The lack of a written order and the lack of a prescription were emphasized. It is true the exception was also mentioned by the court in its instruction but we do not believe that the exception was made sufficiently clear so that the jury understood.

The witness Cantu was asked practically the same question as to each Exhibit, namely: Did he have an Order Blank? (104-108-114) He was also asked if he secured the drugs without a prescription. The court in its instructions on the lack instructed in part as follows:

"Now it says in the beginning, 'It shall be unlawful for any person to deliver, sell, barter, or give away any narcotic drugs except in pursuance of these written orders." (288)

"Now, I have stated the law under which the indictment is found declares it shall be unlawful for any person to sell, barter, exchange, or give away any opium or coca leaves, or any compound, salt, derivative or preparation thereof, except in pursuance of the written order which I have explained to you." (288)

While it is true in its instructions in a general way the court mentioned the exception but no where did the court directly tell the jury that the appellant came under this exception, if he administered the narcotic in the course of his professional practice. On the contrary the necessity for order blanks was emphasized again when the court said:

"It is also undisputed that if the sale or dispensing of morphine and dilaudid, as charged in the various counts in the indictment were made, they were not made upon forms issued in blank for that purpose by the Treasury Department." (289-290)

Let us now consider the small amount of narcotics involved as well as the fact that each time morphine was furnished it was in a solution with atropine and sometimes vitamins and benedril were added. (186)

Each of the Exhibits of Narcotics contained a very small amount of morphine. One of the exhibits contained one-eighth of a grain per c.c. Exhibit 7A contained one-sixteenth of a grain per c.c. and the largest

amount was one-fourth of a grain per c.c. (256) If we take the Exhibits as listed in the first part of this brief, for example, Count V, Exhibit 7A which was 30 c.c. morphine hydrochloride, which was the largest in volume of any of the Exhibits. Considering one-sixteenth of a grain of morphine per c.c. the exhibit contained less than two grains of morphine. The total amount of morphine sulphate or morphine solution in all the counts of all of the indictment amount to ninety cubic centimeters. We believe that the court should take judicial notice of the fact that the total amount of morphine in all these exhibits would satisfy the cravings of an addict for a few days only yet the elapsed time was over two months. Let us take Exhibit 4A of Count I which contained one-twelfth of a grain per c.c., the total amount would be less than one grain (185) and according to the evidence it was not until October 29, almost a month later that another 10 cubic centimeters of morphine was furnished. It is difficult for us to understand how any one could believe that under the circumstances appellant was furnishing morphine to an addict to satisfy his cravings. On the contrary isn't it more reasonable to consider it a treatment?

Dr. Charles Crudden, a Government witness testified that adding atropine to a morphine sulphate solution would alleviate some of the symptoms, if the morphine is given in relatively mild dosage. (284) We also quote the following from his testimony:

"Q. And, as you stated, the combination of the morphine sulphate and atropine is a method of treating an addict?

A. Yes. (285)

Dr. Meyers a defense witness and who had not seen appellant until the day he testified. (252) Dr. Meyers testified as follows with reference to the use of atropine:

"Q. Is it used in the treatment of narcotic addicts?

A. Yes; it is used by physicians. It is not a drug which is commonly used, but certainly if I were to give a drug to an addict and didn't want him to take too much of it, I would put something like atropine in it." (258)

Again in answer to a question which outlines in general the treatment by the appellant: Dr. Meyers answered:

"I would say that such a preparation would definitely be given for treatment, rather than a treat, as you put it." (261)

Critizing the appellant's methods of administering narcotics and charging him with a criminal offense are entirely different propositions. It is not a felony to make an honest mistake or an error in judgment nor is it a crime to use one method of treatment in preference to another.

Specification of Error No. IV

No. IV—"Prejudicial error was committed by the misconduct on the part of the Assistant U. S. Attorney in asking the defendant if he had ever been convicted of a felony."

This assignment charges that prejudicial error was committed by the Assistant U. S. Attorney when he asked the defendant on cross-examination if he had ever been convicted of a felony.

"Q. Have you ever been convicted of a felony?

A. Yes. But it is up on appeal." (222)

When this question was asked appellant the prosecuting attorney who had prosecuted this appellant on an income tax violation was referring to the conviction in that case and, of course, knew that it was on

appeal to this court. This court has since reversed that case and set aside the conviction. That the question was improper and constituted prejudicial error can hardly be questioned. A judgment of conviction which is on appeal is not final.

Campbell v. U. S.
176 Fed (2nd) 45
U. S. vs. Empire Packing Co.
174 Fed 2nd, 17
16 Words and Phrases, permanent Addition p. 592
Pocket Supplement, 16 words and Phrases, p. 16
Frances v. Weaver, (MD) 25 Atlantic 413
Blaufus v. People (N.Y.) 25 Am Reports 148
Ashcraft v. State (Okla.) 94 Pac. 2nd 939 p. 945
Jennings v. State (Texas) 115 Southwestern 587
Ringer v. State (Texas) 129 Southwestern 2nd, 654
Adams v. State, 125 Southwestern 2nd, 397

We desire to quote at some length from the Campbell case supra:

"But it seems to us wholly illogical and unfair to permit a defendant to be interrogated about a previous conviction from which an appeal is pending. If the judgment of conviction is later reversed, the defendant has suffered, unjustly and irreparably, the prejudice, if any, caused by the disclosure of the former conviction. We therefore hold that the pendency of an appeal prevents the prosecution from proving a previous conviction for impeachment purposes; and that the District Court erred in admitting evidence concerning Campbell's conviction when his appeal therefrom had not been determined."

The following quotation from the Campbell case is particularly pertinent:

"* * * Necessarily the character of the proceeding, *what is at stake* upon its outcome, and the relation of the error asserted to casting the balance for de-

cision on the case as a whole, are material factors in judgment." (citing 328 U. S. 762) (Emphasis supplied)

The methods by which the Court can determine if the error was prejudicial and would warrant a reversal is also discussed in the Campbell case:

"But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand." (citing 328 U. S. p. 764)

SUMMARY

At the outset we are compelled to admit that as to some of the errors complained of there was no proper objection or motions made by the appellant at the time of the trial. We are confident, however, that if this court after considering all of the evidence and the cumulative effect of the errors feel that the appellant did not have a fair and impartial trial that it will take notice of all the errors tending to effect the verdict.

A proper motion was made based upon the insufficiency of the evidence and a motion was also made asking that the evidence resulting from the search of appellant's premises be suppressed. (19-20) (23)

In the motion for a new trial and for an acquittal (23) the question of entrapment and the prejudicial questioning of appellant regarding the prior conviction were properly raised in the Court below. Although there was no objections to the question at the time it

was asked. The question in itself was not objectionable. It was not until the answer indicating that the only prior conviction was the income tax case that was on appeal that the counsel representing the defendant would know that the question was not proper. The attorney asking the question however did know and for that reason it was improper. After such a question is asked even though the answer is in the negative, or as in this case, answered and explained, there is no way in which the minds of the jurors can be disabused of the conclusion that the defendant has been found guilty of a serious crime. We sincerely urge that in the present case where the issue of appellant's guilt was so evenly balanced the fact of a conviction in the income tax case could have been the straw that threw the balance against the appellant.

The question of entrapment has been discussed at length elsewhere in this Brief. Risking the charge of unnecessary repetition we again call the court's attention to the long record of appellant as a practicing physician and failure of the Federal Officers after a vigil of three years to find a single violation. They finally resorted to an appeal by one of his patients to help the patient's brother. We submit that these facts paint a picture of illegal entrapment which the court ought to refuse to sanction. Primarily the administering of narcotics by a physician is a medical question and the courts should be slow to impose their views upon the medical profession. Doctors may differ among themselves as to their treatment in many cases. One Doctor may use a certain method, that there may be a better and safer method is not a sufficient reason for charging the Doctor with a felony.

In the present case as heretofore pointed out the two Doctors testified and agreed that the appellant's method

would be considered a treatment. One must have only a slight knowledge of narcotics and addicts to know that the amount of narcotics furnished by appellant in this case and the manner in which they were mixed by adding atropine, benedril and vitamins could not have been given for the purpose of satisfying an addiction.

In conclusion we contend that had it not been for the many prejudicial errors here complained of, the jury would have been justified in disregarding and probably would have disregarded much of the testimony of witness Cantu, and it is almost solely upon the testimony of Cantu that the Government's case rests.

We respectfully submit that this court order a dismissal of this case by reason of the illegal entrapment or in the alternative that this court give the appellant an opportunity to have his case submitted to a jury free from those prejudicial and confusing incidents contained in the record of this case.

Respectfully submitted,
FRANK E. FLYNN
Attorney for Appellant
202 Arizona Title Bldg.
Phoenix, Arizona.